

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
13,648-s40A BY ROBERTS LOAN AND)
CATTLE COMPANY)

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on April 27, 1978 by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

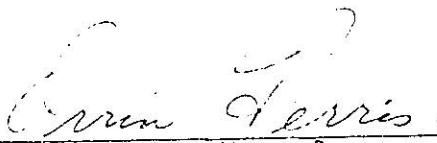
FINAL ORDER

The Application for Beneficial Water Use Permit No. 13,648-s40A by Roberts Loan and Cattle Company is hereby denied.

RECOMMENDATION

The Department recommends that all parties in this matter install and maintain adequate measuring devices to fit their particular individual situation, and keep a record of water used for their own proof of their water rights and use.

Done this 16th day of June, 1978.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 13648

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
13,648-s40A BY ROBERTS LOAN AND
CATTLE COMPANY

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on March 30, 1978, at Roundup, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit No. 13,648-s40A, William F. Throm, Hearing Examiner presiding.

The Applicant, Roberts Loan and Cattle Company, represented by Mr. Robert E. Lee and Mr. Rodney M. Dahl, appeared at the hearing and presented testimony in support of the application. The Roberts Loan and Cattle Company was not represented by legal counsel. No exhibits were introduced in support of the application.

Others appearing at the hearing and testifying in support of the application were Mr. Gary G. Robson.

One Objector attended the hearing and presented testimony or statements. The Objector present was Mr. Nick Rath. Mr. Rath was represented by legal counsel Roy Rodeghiero, Attorney at Law, Roundup, Montana. The Objector introduced six exhibits supporting his objection to wit: Exhibit O-1, photo copy of Water Rights Report, Musselshell County Abstract and Title Company, dated September 27, 1977; Exhibits O-2 through O-6 are certified copies of the Appropriation Documents. The Objector's Exhibits were marked accordingly and received into the record without objections.

Persons appearing to testify on behalf of the Objector was Mr. Steve MacPher.

Montana Department of Natural Resources and Conservation personnel present and testifying on behalf of the Department were Mr. Stan Jones, Hearings Technical Representative, Water Rights Bureau. The Department was not represented by legal counsel. Six exhibits were introduced by the Department to wit: Exhibit D-1, Stan Jones Field Report; D-2, copy of topographic map Goulding Creek Watershed; D-3, photo copies of Water Resources Surveys, Townships 6 & 7 North, Range 25 East, Musselshell County; D-4, photo copies of old aerial photographs of Goulding Creek Watershed; D-5, a series of 6 photographs of the project area; and D-6, Stan Jones' hydrologic computations for the watershed. The Department Exhibits were marked accordingly and received into the record without objections.

SUMMARY OF THE RECORD

1. On June 24, 1977, the Department received an Application for Beneficial Water Use Permit No. 13,648-s40A by Roberts Loan and Cattle Company to appropriate 1.33 cubic feet per second or 600 gallons per minute of water, not to exceed 267 acre-feet per annum from Goulding Creek, a tributary of the Musselshell River, in Musselshell County, Montana. The water is to be impounded and diverted from Goulding Creek in two new 2 acre-foot reservoirs at points in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5; in a new 1 acre-foot reservoir in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18; in an existing 8 acre-foot reservoir in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 7; and in an existing .25 acre-foot reservoir in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 8, all in Township 6 North, Range 25 East, M.P.M., and diverted from said reservoirs by means of a portable pump and used for new irrigation on 34 acres in the S $\frac{1}{2}$ of Section 5, 33 acres in the N $\frac{1}{2}$ of Section 8, 10 acres in the SE $\frac{1}{4}$ of Section 7, 22 acres in the NE $\frac{1}{4}$ of Section 18, all in Township 6 North, Range 25 East, M.P.M., and containing a total of 99 acres.

1 more or less, from May 1 to October 15, inclusive, of each year.

2 2. On October 12, 19 and 26, 1977, the Department caused to be duly
3 published in the Roundup Record Tribune, Roundup, Montana, notice of the above
4 Application for Beneficial Water Use Permit No. 13,648-s40A.

5 3. The Department received objections to the above Application for
6 Beneficial Water Use Permit No. 13,648-s40A as follows:

7 November 15, 1977, from Mr. Lowell A. Rathbun

8 November 28, 1977, from Mr. Nicholas T. Rath.

9 4. On January 6, 1978, the Department notified Mr. Lowell A. Rathbun
10 that his objection was not valid inasmuch as the Applicant's points of diver-
11 sion are downstream from Mr. Rathbun's claimed points of diversion therefore
12 the Objector's prior water rights cannot be adversely affected by the granting
13 of the applied for permit.

14 5. Mr. Lee testified that the proposed appropriation would be made by
15 impounding Goulding Creek water in a series of five dams with a total storage
16 capacity of 13.5 acre-feet. The dams will be on Goulding Creek and will con-
17 sist of an existing 8.0 acre-foot reservoir in Section 7 and an existing 0.25
18 acre-foot reservoir in Section 8, and three new reservoirs consisting of two
19 2.0 acre-foot reservoirs and one 1.0 acre-foot reservoir in Section 18, all in
20 Township 6 North, Range 25 East. Water will be diverted from the reservoirs
21 by means of a pump with as yet an undetermined capacity but probably in the
22 range of 250 gallons per minute, and used for new irrigation by means of a
23 sprinkler system on a total of approximately 99 acres. Mr. Lee testified that
24 Goulding Creek flows year around through their place with the possible exception
25 of perhaps one year to his knowledge when it dried up. He further testified that
26 water would be released from one dam to the next for their irrigation and stock-
27 watering purposes. He testified that the impoundments would be made by exca-
28 vation of pit reservoirs in the bed of Goulding Creek with the excavated material

1 being used for embankment fill. Mr. Lee was unable to describe in satisfactory
2 detail what means would be provided to release or by-pass from such a structure
3 the water required to satisfy prior rights claimed by the Objectors. Mr. Lee
4 testified that it was not his intentions to appropriate a full irrigation
5 supply of 267 acre-feet per annum for the 99 acres as set forth in his appli-
6 cation but that an inch or two applied at a critical time up to 50 acre-feet
7 per annum would assure him of a good crop of hay and pasture and would satisfy
8 his needs.

9 6. Mr. Dahl testified that he has lived on the Roberts Loan and Cattle
10 Company Ranch for seven years and that water in Goulding Creek has flowed by
11 his house all that time but that occasionally Goulding Creek does dry up
12 about 2 miles down the road. He testified that in his opinion the construction
13 of the impoundments would improve stream flow conditions downstream because the
14 dams would be filled during periods of high runoff or periods of non-irrigation
15 use by prior appropriators and thus would improve the groundwater conditions
16 for return flow to Goulding Creek.

17 7. Mr. Rath testified that his parents bought the ranch he now owns
18 in 1907; that he has lived on the ranch all his life which is 52 years; that
19 the first irrigation system was installed by his father in 1932 or 1933 covering
20 about 90 acres but many times there was not a sufficient quantity of water
21 available to irrigate that acreage, therefore over the years they improved the
22 efficiency of the system to get better coverage and use of the water. Mr. Rath
23 testified that of the land acquired by him over the years, that there is
24 approximately 278 acres of irrigated land, including the original 90 acres,
25 under ditches for which water has been appropriated for irrigation purposes but
26 that Goulding Creek does not provide a sufficient flow to irrigate all of this
27 acreage. Therefore they have cut back to approximately 88 acres presently
28 irrigated and in most years there is no more than enough water to irrigate that

1 acreage. Mr. Patrs testified that perhaps two or three times in his memory,
2 there has been a wild runoff because of a cloudburst or spring snow-melt that
3 produces more water than they could use. He stated that the present condition
4 of the creek bed indicates that there is no large volume of runoff as evidenced
5 by the absence of holes or ponds and that this condition has existed over the
6 past decade or so. He testified that in normal years there is sufficient flow
7 to maintain a useable irrigation head until about the middle of April or the
8 first of May, however, he testified that he does irrigate as long as there is a
9 useable water supply from Goulding Creek.

10 PROPOSED FINDINGS OF FACT

11 1. The normal flow of Goulding Creek is fully appropriated during the
12 irrigation season.

13 2. There are unappropriated waters in Goulding Creek during the winter
14 months, at times of heavy spring runoff from snow-melt and at other times of
15 high intensity short duration summer storms, however, such times are relatively
16 infrequent and unreliable and the waters are not necessarily available at times
17 when the water can be put to the use proposed by the Applicant nor in the amount
18 the Applicant seeks to appropriate.

19 3. The unappropriated waters could be appropriated without adverse effect
20 to prior existing water rights if a means were provided to release or by-pass all
21 water necessary to satisfy prior existing water rights from the source of supply,
22 however, it is not known whether such means are economically or physically
23 feasible. Without such means of release or by-pass the Applicant would preempt
24 water supplies to the adverse effect of prior appropriators.

25 4. The Applicant was unprepared to testify as to the specific rate of
26 flow or volume of water to be appropriated and was unable to testify as to what
27 means, if any, would be provided in the proposed and existing structures to
28 release or by-pass, in a timely manner, a sufficient rate of flow or volume of

1 water to satisfy prior existing water rights from the source of supply.

2 PROPOSED CONCLUSIONS OF LAW

3 1. Under the provisions of Section 89-860, R.C.M. 1947, a Beneficial
4 Water Use Permit is required by the Applicant to appropriate water from the
5 proposed source of supply.

6 2. The Objector, Nicholas T. Rath, has apparent prior existing water
7 rights from the proposed source of supply which by law must be protected, how-
8 ever, the quantification and final determination of the validity of such rights
9 must await the adjudication process mandated by Section 89-870 et seq., of the
10 Montana Water Use Act, and any permits issued must be subject to that final
11 determination.

12 3. The rights of prior appropriators will be adversely affected unless
13 the proposed means of diversion provides a means whereby all waters necessary
14 to satisfy the rights of prior appropriators may be released or by-passed.

15 4. The proposed means of diversion or construction are not adequate to
16 show the rate and volume of water to be appropriated nor the means whereby
17 water may be released or by-passed in a timely manner at the rate and volume
18 necessary to protect the rights of prior appropriators from the source of supply.

19 5. The Application for Beneficial Water Use Permit No. 13,648-s40A by
20 Roberts Loan and Cattle Company having failed to meet the criteria set forth in
21 Section 89-885 (3) must be denied.

22 PROPOSED ORDER

23 1. The Application for Beneficial Water Use Permit No. 13,648-s40A by
24 Roberts Loan and Cattle Company is hereby denied.

25 NOTICE

26 This is a Proposed Order and will not become final until accepted by the
27 Administrator of the Water Resource Division of the Department of Natural
28 Resources and Conservation. Written exceptions to the Proposed Order, if any,

1 shall be mailed to the Department within ten (10) days after receipt of service
2 of the Proposal for Decision upon parties herein. No extensions of time for
3 filing exceptions will be granted. Upon receipt of any written exceptions
4 opportunity will be provided to file briefs and to make oral arguments before
5 the Department Hearing Examiner.

6 DATED this 27th day of April, 1978.

7
8 
9 WILLIAM F. THROM
10 HEARING EXAMINER
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CASE # 13648

AFFIDAVIT OF SERVICE
(Proposed Order)

STATE OF MONTANA

ss.

County of Lewis and Clark)

Ronald J. Guse, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That, on April 28, 1978, he deposited in the United States mail, "certified mail, return receipt requested," a copy of the Proposed Order by the Department Hearing Examiner on the application by Roberts Loan and Cattle Company, Application No. 13,648-s40A, for a permit to appropriate water, addressed to each of the following persons or agencies: Certified Nos. 51496 to 51500

1. Mr. Edward A. Spidel, President, Roberts Loan and Cattle Company, P.O. Box 507, Roundup, MT 59072 (Applicant)
2. Mr. Nicholas T. Raths, P.O. Box 305, Roundup, MT 59072
3. Mr. Roy C. Rodeghiero, Attorney at Law, No. 1 Main Street, Roundup, MT 59072
4. Mr. Lowell A. Rathbun, 1266 Stratford Lane, Carlsbad, CA 92008
5. Messrs. Rodney M. Dahl and Robert E. Lee, Goulding Creek Route, Roundup, MT 59072

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by

Ronald J. Guse

STATE OF MONTANA)

)

ss.

County of Lewis and Clark)

On this Twenty Eighth day of April, 1978, before me, a Notary Public in and for said State, personally appeared Ronald J. Guse, known to me to be the Asst. Chief, Water Rights Bureau, of the department that executed this instrument or the persons who executed the instrument on behalf of said department, and acknowledged to me that such department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

T. J. Reynolds

Notary Public for the State of Montana

Residing at _____ NOTARY PUBLIC for the State of Montana

Residing at Helena, Montana

My Commission Expires July 16, 1980

My commission expires _____

CASE # 13648